Supreme Court of Ohio Clerk of Court - Filed May 18, 2016 - Case No. 2014-1966

IN THE SUPREME COURT OF OHIO

VERNON L. TRIBETT, *et al.*, Plaintiffs-Appellees, v. BARBARA SHEPHERD, *et al.*, Defendants-Appellants,	Ohio Supreme Court Case No. 2014-1966 On Appeal from the Belmont County Court of Appeals, Seventh District Court of Appeals Court of Appeals Case No. 13 BE 22

MERIT BRIEF OF *AMICI CURIAE*, JEFFCO RESOURCES, INC., RICHMOND MILL, INC., DOUGLAS HENDERSON, DJURO AND VESNA KOVACIC, BRETT AND KIM TRISSEL, CAROL MILLER, BARBARA L. MILLER, JEFFREY V. MILLER, JERILYN E. CHRISTENSEN AND KJELD F. CHRISTENSEN, CO-TRUSTEES OF THE KJELD F. CHRISTENSEN REVOCABLE TRUST DATED SEPTEMBER 25, 2012, AND THE JERILYN E. CHRISTENSEN REVOCABLE TRUST DATED SEPTEMBER 25, 2012, RALPH AND SHARLEY GREER, JEFFREY HICKMAN, AND CHRISTOPHER AND VERONICA WENDT, IN OPPOSITION TO APPELLANTS' PROPOSITIONS OF LAW

Richard A. Myser (0007462)*
**Counsel of Record*
Adam L. Myser (0090942)
320 Howard Street
Bridgeport, Ohio 43912
myser@belmontlaw.net
adam.myser@belmontlaw.net
Counsel for Appellees

Matthew Warnock (0082368)*
*Counsel of Record
Daniel Gerken (0088259)
Bricker & Eckler LLP
100 South Third Street
Columbus, OH 43215
P: (614) 227-2300 / F: (614) 227-2390
mwarnock@bricker.com;
dgerken@bricker.com
Counsel for Appellants

Gregory W. Watts (0082127)*
**Counsel of Record*
Matthew W. Onest (0087907),
David E. Butz (0039363), and
William G. Williams (0013107) of
KRUGLIAK, WILKINS, GRIFFITHS
& DOUGHERTY CO., L.P.A.
4775 Munson Street NW/P.O. Box 36963
Canton, Ohio 44735-6963
Phone: (330) 497-0700/Fax: (330) 497-4020
gwatts@kwgd.com; monest@kwgd.com;
dbutz@kwgd.com; bwilliams@kwgd.com
Counsel for Amici Curiae, Jeffco Resources, Inc., Richmond Mill, Inc., Douglas Henderson, Djuro and Vesna Kovacic, Brett and Kim Trissel, Carol Miller, Barbara L. Miller, Jeffrey V. Miller, Jerilyn E. Christensen and Kjeld F. Christensen, Co-Trustees of the Kjeld F. Christensen Revocable Trust dated

September 25, 2012, and the Jerilyn E. Christensen Revocable Trust dated September 25, 2012, Ralph and Sharley Greer, Jeffrey Hickman, and Christopher and Veronica Wendt

TABLE OF CONTENTS

STATEMENT OF INTEREST 1

STATEMENT OF THE CASE AND FACTS 2

ARGUMENT AGAINST PROPOSITIONS OF LAW 3

I. PROPOSITION OF LAW NO. III: Interpreting the 1989 version of the DMA as "self-executing" violates the Ohio Constitution. 3

A. The 1989 DMA does not constitute a taking of property. 3

B. The 1989 DMA does not operate retroactively. 5

1. The 1989 DMA was not retroactive. 5

2. Even if the Court finds the 1989 DMA was retroactive, it is remedial in nature. 8

C. The 1989 DMA provided all severed mineral holders sufficient due process by providing a three-year grace period and by identifying several, simple methods to preserve their interests. 9

1. The 1989 DMA affects abandoned property interests, and therefore, holders of abandoned mineral interests are not entitled to due process protections. 10

2. Ohio's Constitution, including its Due Process Clause, was modeled explicitly after the United States Constitution. 11

3. The 1989 DMA operates in the same manner as the Ohio Marketable Title Act which complies with the Due Process Clause of the Ohio Constitution. 14

D. The 1989 DMA is not void-for-vagueness because it provides a simple, preserving mechanism whereby an average person would understand that severed mineral holders must use their interests. 16

1. The correct standard of review is the "substantially incomprehensible" standard and not a heightened standard. 16

2. The 1989 DMA gave simple, reasonable steps for the preservation of severed mineral rights and in doing so, unequivocally placed the burden of action upon the severed mineral holders. 18

II. PROPOSITION OF LAW NO. VII: A claim brought under the 1989 version of the DMA must have been filed within 21 years of March 22, 1989 (or, at the very latest, March 22, 1992), or such claim is barred by the statute of limitations in R.C. 2305.04. 20

A. The 1989 DMA placed the burden of action upon the severed mineral holders and as a result, they, and not the surface owners, were required to act. 20

B. Appellants' arguments would render the Marketable Title Act useless. 22

C. A surface owner's claim for quiet title would not accrue upon the severed interest's abandonment, but upon the severed mineral holder's assertion of continued validity after the abandonment. 24

D. A surface owner's claim for quiet title would not accrue until he or she actually owned the surface estate at issue. 25

CONCLUSION.....27
PROOF OF SERVICE.....29

TABLE OF AUTHORITIES

Page(s)

Cases

State ex rel. A.A.A. Investments v. City of Columbus,
17 Ohio St.3d 151, 478 N.E. 2d 773 (1985) 3, 4, 6, 16

Ackison v. Anchor Packing Co.,
120 Ohio St.3d 228, 897 N.E.2d 1118 (2008) 6

In re Application of Columbus S. Power Co.,
134 Ohio St.3d 392, 2012-Ohio-5690, 983 N.E.2d 276 .....16, 17

Arbino v. Johnson & Johnson,
116 Ohio St.3d 468, 880 N.E.2d 420 (2007) 11

Ashland v. Hardesty
(1975), 23 Or.App. 523, 543 P.2d 41.....3

Bergholtz Coal Holding Co. v. Dunning,
11th Dist. Lake No. 2004-L-209, 2006-Ohio-3401 (June 30, 2006) 26

Board of Commrs. v. Flickinger
(Colo.1984), 687 P.2d 975.....3

Buckley v. Wilkins,
105 Ohio St.3d 350, 2005-Ohio-2166, 826 N.E.2d 811 (2005).....18

Chavez v. Hous. Auth. of El Paso,
973 F.2d 1245 (C.A.5, 1992) 18

Coates v. Cincinnati,
402 U.S. 611, 91 S.Ct. 1686, 29 L.Ed.2d 214 (1971).....16

Collins v. Moran,
7th Dist. Mahoning No. 02 CA 218, 2004-Ohio-1381 (March 17, 2004) 14, 22

Columbia Gas Transm. Corp. v. Levin,
117 Ohio St.3d 122, 2008-Ohio-511, 882 N.E.2d 400 ..... *passim*

Dodd v. Croskey,
143 Ohio St.3d 293, 2015-Ohio-2362, 37 N.E.3d 147 2

Doe v. Archdiocese of Cincinnati,
109 Ohio St.3d 491, 849 N.E.2d 268 (2006) 6

Dunnick v. Stockgrowers Bank of Marmouth
(1974), 191 Neb. 370, 215 N.W.2d 93.....3

E. Liverpool v. Columbiana Cty. Budget Comm.,
114 Ohio St.3d 133, 2007-Ohio-3759, 870 N.E.2d 705 7

Evans v. Cormican,
5th Dist. Licking No. 09 CA 76, 2010-Ohio-541 (Jan. 5, 2010) 14, 22

Groch v. Gen. Motors Corp.,
117 Ohio St.3d 192, 2008-Ohio-546, 883 N.E.2d 377 (2008).....11

Halliday v. Norfolk & W. Ry. Co.,
44 Ohio Law Abs. 208, 62 N.E.2d 716 (2nd Dist. 1945) 24

Hawkins v. Barney's Lessee,
5 Pet. 457, 8 L.Ed. 190.....4

Heifner v. Bradford,
4 Ohio St.3d 49, 446 N.E.2d 440 (1983) 14, 22

Heifner v. Bradford,
5th Dist. Case No. CA-81-10, 1982 WL 2902 (Jan. 29, 1982) *overruled on other grounds by* 4 Ohio St.3d 49 (1983) 7, 15

In re Hua,
62 Ohio St.2d 227, 405 N.E.2d 255 (1980) 11

Hutchins v. Dist. of Columbia,
188 F.3d 531 (C.A.D.C.1999).....18

Hyle v. Porter,
117 Ohio St.3d 165, 882 N.E.2d 899 (2008) 5

Kentucky Dept. of Parks v. Stephens
(Ky.1966), 407 S.W.2d 711 3

Matheson v. Morog,
6th Dist. Erie No. E-00-017, 2001 WL 85149 (Feb. 2, 2001) 24

McCarley v. O.O. McIntyre Park Dist.,
4th Dist. Gallia No. 99 CA 07, 2000 WL 203997 24

Miami Cty. v. City of Dayton,
92 Ohio St. 215, 110 N.E. 726 (1915) 10

Norwood v. Horney,
110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115
.....16, 17, 18, 19

Peebles v. Clement,
63 Ohio St.2d 314, 408 N.E.2d 689 (1980) 11

Pinkney v. Southwick Investments, L.L.C.,
8th Dist. Cuyahoga Nos. 85074, 85075, 2005-Ohio-4167 (Aug. 11, 2005).....15

Pinkney v. Southwick Investments, LLC,
8th Dist. Nos. 85074 & 85075, 2005 WL 1926507 (Aug. 11, 2005) 9

Skilling v. United States,
561U.S. 358, 130 S.Ct. 2896, 177 L.Ed.2d 619 (2010).....16

Sogg v. Zurz,
121 Ohio St.3d 449, 2009-Ohio-1526, 905 N.E.2d 187 10

State of Ohio v. Consilio,
114 Ohio St.3d 295, 871 N.E.2d 1167 (2007) 5, 6

State v. Anderson,
57 Ohio St.3d 168, 566 N.E.2d 1224 (1991) 16

State v. Cook,
83 Ohio St. 3d 404, 700 N.E.2d 570 (1998) 8

State v. Cowan,
103 Ohio St.3d 144, 814 N.E.2d 846 (2004) 9

State v. Hawkins
(1999), 87 Ohio St.3d 311, 720 N.E.2d 521 8

State v. Hochhausler
76 Ohio St.3d 455, 668 N.E.2d 457 (1996) 9

State v. Newberry,
77 Ohio App.3d 818, 603 N.E.2d 1086 (4th Dist. 1991).....10

Texaco v. Short,
454 U.S. 516, 102 S.Ct. 781 (1982)..... *passim*

Thompson v. Custer,
2014-Ohio-5711, 26 N.E.3d 278 (11th Dist.) 7, 9, 20

Tobacco Use Prevention & Control Found. Bd. of Trustees v. Boyce,
127 Ohio St.3d 511, 2010-Ohio-6207, 941 N.E.2d 745 7

Tribett v. Shepherd,
2014-Ohio-4320, 20 N.E.3d 365.....7, 9, 25, 26

Van Slooten v. Larsen,
410 Mich. 21, 299 N.W.2d 704 (1980).....10

Walker v. Shondrick-Nau,
7th Dist. Noble No. 13 NO 402, 2014-Ohio-1499.....20

Webster v. Pittsburg, C. & T.R. Co.,
78 Ohio St. 87, 84 N.E. 592 (1908).....25

Wendt v. Dickerson,
5th Dist. Tuscarawas No. 2014 AP 01 0003, 2014-Ohio-4615 (Oct. 16, 2014).....9, 20

Statutes

R.C. 1.48.....5, 6

R.C. 1.58.....5

R.C. 2305.04.....3, 19, 21, 27

R.C. 5031.56(B).....18

R.C. 5301.47, *et seq.*..... *passim*

R.C. 5301.49(D).....14, 22

R.C. 5301.51.....14, 22

R.C. 5301.55.....21, 22

R.C. 5301.56..... *passim*

R.C. 5301.56(B).....17

R.C. 5301.56(B)(1).....14, 19

R.C. 5301.56 (B)(1)(c)(i)-(vi).....20

R.C. 5301.56(B)(c).....19

R.C. 5301.56(D)(1).....8

R.C. 5303.01.....20, 24

Other Authorities

Ohio Constitution Article I, § 16 .....11, 13, 15

Ohio Constitution Article I, § 19 3

Ohio Constitution Article II, § 28 7

Ohio Constitution Article II, § 36 11

Fifth Amendment to the U.S. Constitution 11

United States Constitution 11

STATEMENT OF INTEREST

Amici Curiae, Counsel for Amici Curiae Jeffco Resources, Inc., Richmond Mill, Inc., Douglas Henderson, Djuro and Vesna Kovacic, Brett and Kim Trissel, Carol Miller, Barbara L. Miller, Jeffrey V. Miller, Jerilyn E. Christensen and Kjeld F. Christensen, Co-Trustees of the Kjeld F. Christensen Revocable Trust dated September 25, 2012, and the Jerilyn E. Christensen Revocable Trust dated September 25, 2012, Ralph and Sharley Greer, Jeffrey Hickman, and Christopher and Veronica Wendt, submit this Amicus Brief in opposition of Appellants' Proposition of Law No. III and Proposition of Law No. VII.

Amici Curiae are Ohio residents and real property owners who will be directly affected by the Court's interpretation of R.C. 5301.56 (in effect prior to June, 30, 2006) ("1989 DMA"). Amici Curiae own over 9,000 acres of real property located in the State of Ohio, including Belmont, Carroll, Guernsey, Harrison, and Jefferson Counties, portions of which were previously subject to severances of oil, gas, and/or other mineral rights. They, like many other landowners throughout the State of Ohio, have obtained vested ownership rights in previously severed mineral rights through the inaction of the previous holders of those rights; in many cases such inaction can span multiple generations and decades. Amici Curiae have a vested interest in preserving their ownership of mineral rights which were previously abandoned and vested under the 1989 DMA. Additionally, Amici Curiae, Christopher and Veronica Wendt, are parties in the Ohio Supreme Court Case No. 2014-2051, which is currently stayed before this Court.

As discussed more fully below, the 1989 DMA was adopted on March 22, 1989, in order to promote the efficient production and exploration of Ohio's natural resources, including oil, gas, and related hydrocarbons, promote title simplicity by re-unifying old unused interests, which over time can become splintered and fractionalize, in a readily identifiable surface owner, and

provide title certainty that if certain statutorily specified events did not occur within a certain time frame, then the interest was abandoned and vested in the surface owner. It promoted these policy goals by placing minimal obligations upon those individuals who owned severed mineral rights, i.e., those mineral rights not owned by the surface owners of the affected surface estates, in order to preserve those interests, including merely filing a claim to preserve once every 20 years. The only reasonable method for promoting these policy goals was to have the law operated prospectively and in perpetuity.

STATEMENT OF THE CASE AND FACTS

This case involves a 1962 reservation of mineral interests. It is undisputed that the severed mineral interest holders (Appellants) failed to undertake any action with respect to that severed mineral interest for almost fifty years, until 2011, and almost twenty years after it has been abandoned by operation of law. Appellants only point to serendipitous repetitions within the surface chain of title as potential savings events. However, that issue is not currently being briefed before the Court in this case. Please see the Merit Brief of Amici Curiae Jeffco Resources, Inc. et al., filed September 29, 2014, in case *Dodd v. Croskey*, Supreme Court Case No. 2013-1730 (providing argument in opposition to the proposition of law that "[a] restatement of a prior mineral reservation in later deeds is a "title transaction" within the meaning of § 5301.46, Ohio Revised Code"), as to why those repetitions are not a savings event for Appellants.

ARGUMENT AGAINST PROPOSITIONS OF LAW

I. **PROPOSITION OF LAW NO. III: Interpreting the 1989 version of the DMA as "self-executing" violates the Ohio Constitution.**

A. **The 1989 DMA does not constitute a taking of property.**

The 1989 DMA does not effectuate a taking, and raises no constitutional concerns. The statute simply provides for the lapse or abandonment of severed mineral rights once the statutory period in R.C. 5301.56 has expired if the severed mineral holder has failed to act.

In *State ex rel. A.A.A. Investments v. City of Columbus*, 17 Ohio St.3d 151, 152, 478 N.E. 2d 773 (1985), this Court addressed this very issue in the context of adverse possession. Like the Appellants in this case, the prior record holder in *A.A.A. Investments* alleged the "taking" of their private property through adverse possession violated Section 19, Article I of the Ohio Constitution. This Court held, like the 1989 DMA, where title ownership of an absent inactive holder lapses and vests with the adverse possessor, the adverse possessor is thereafter maintaining its possession, and not taking property. In reaching this conclusion, this Court expressly relied on the United States Supreme Court holding in *Texaco v. Short*, 454 U.S. 516, 102 S.Ct. 781 (1982):

> In the case of adverse possession, property is not taken. Rather, once the statutory period enunciated in R.C. 2305.04 has expired, the former titleholder has lost his claim of ownership and the adverse possessor is thereafter maintaining its possession, not taking property. Such a conclusion is consistent with results in other jurisdictions which have addressed this challenge as well as the United States Supreme Court's recent pronouncement in *Texaco, Inc. v. Short* (1982), 454 U.S. 516, 102 S.Ct. 781, 70 L.Ed.2d 738. *Texaco* concerned the issue of whether an interest in mineral rights had lapsed or had been taken without just compensation by the state government in violation of the Fourteenth Amendment. The court stated, *inter alia*, "It is the owner's failure to make any use of the property-and not the action of the State-that causes the lapse of the property right; there is no 'taking' that requires compensation." *Id.* at 530, 102 S.Ct. at 792. See, also, *Board of Commrs. v. Flickinger* (Colo.1984), 687 P.2d

> 975; *Ashland v. Hardesty* (1975), 23 Or.App. 523, 543 P.2d 41; *Dunnick v. Stockgrowers Bank of Marmouth* (1974), 191 Neb. 370, 215 N.W.2d 93; *Kentucky Dept. of Parks v. Stephens* (Ky.1966), 407 S.W.2d 711.

State, ex rel. A.A.A. Investments v. City of Columbus, 17 Ohio St. 3d at 152-53.

As the United States Supreme Court stated:

> We have no doubt that, just as a State may create a property interest that is entitled to constitutional protection, the State has the power to condition the permanent retention of that property right on the performance of reasonable conditions that indicate a present intention to retain the interest.
>
> From an early time, this Court has recognized that States have the power to permit unused or abandoned interests in property to revert to another after the passage of time. In *Hawkins v. Barney's Lessee*, 5 Pet. 457, 8 L.Ed. 190, the Court upheld a Kentucky statute that prevented a landowner from recovering property on which the defendant had resided for more than seven years under a claim of right. The Court stated:
>
> "Such laws have frequently passed in review before this Court; and occasions have occurred, in which they have been particularly noticed as laws not to be impeached on the ground of violating private right. What right has any one to complain, when a reasonable time has been given him, if he has not been vigilant in asserting his rights?" Id., at 466.

Texaco, Inc. v. Short, 454 U.S. at 526. The United States Supreme Court upheld the power of the states "to condition the retention of a property right upon the performance of an act within a limited period of time. In each instance, as a result of the failure of the property owner to perform the statutory condition, an interest in fee was deemed as a matter of law to be abandoned and to lapse. *Id.* at 529.

Each of the actions required by the 1989 DMA to avoid an abandonment of a severed mineral interest furthers a legitimate state goal. As the United States Supreme Court noted, certainly the state may encourage owners of mineral interests to develop the potential of those interests, the fiscal interest in collecting property taxes is manifest, and the requirement that a

mineral owner file a public statement of claim furthers both of these goals by facilitating the identification and location of mineral owners, from whom developers may acquire operating rights and from whom the county may collect taxes. *Id.* "The State surely has the power to condition the ownership of property on compliance with conditions that impose such a slight burden on the owner while providing such clear benefits to the State." *Id.* at 529-30.

"The requirement that an owner of a property interest that has not been used for 20 years must come forward and file a current statement of claim is not itself a 'taking.'" *Id.* at 530. The abandonment or lapse of the severed mineral interest holder's title is the consequence of his own neglect.

B. **<u>The 1989 DMA does not operate retroactively.</u>**

As an initial matter, the amendments to the 1989 DMA in 2006 did not remove any ambiguity, but rather removed the automatic abandonment feature of the act and enacted a statutory notice mechanism to which surface owners must adhere prior to abandonment. In any event, an amendment or repeal of the 1989 DMA did not affect the prior operation of that statute. R.C. 1.58. Finally, when seeking to determine the legislative intent behind the 1989 DMA, the Court is confined to examining the legislative history of the 1989 DMA, without regard to the 2006 amendments made thereto, because the members of the General Assembly in 1989 may not be the same members in 2006.

1. **The 1989 DMA was not retroactive.**

Appellants erroneously argue the 1989 DMA is retroactive because the plain language of the statute contains a twenty year look-back period. (*See* Petitoners' Merit Brief, pp. 11-12). When determining whether a statute may be applied retroactively, Ohio courts follow a two-prong test. *State of Ohio v. Consilio*, 114 Ohio St.3d 295, 871 N.E.2d 1167 (2007). The first prong, created in accordance with R.C. 1.48, asks whether the statute was "expressly made"

retroactive. R.C. 1.48; *Hyle v. Porter*, 117 Ohio St.3d 165, 882 N.E.2d 899 (2008). Only if the answer is "yes" can one then proceed to the second prong, which focuses upon whether the statute affects substantive rights or is remedial in nature. *Consilio*, 114 Ohio St.3d 295.

The default rule is that Ohio statutes are applied prospectively. If the retroactivity of a statute is not expressly stated in plain terms, the presumption in favor of prospective application controls and ends the analysis. *Consilio*, 114 Ohio St.3d 295, paragraph one of the syllabus ("A statute must clearly proclaim its own retroactivity to overcome the presumption of prospective application. Retroactivity is not to be inferred."). Pursuant to R.C. 1.48, if a statute is silent as to whether it is to apply retroactively, a court must apply it prospectively only. *Consilio*, 114 Ohio St.3d 295 *citing Doe v. Archdiocese of Cincinnati*, 109 Ohio St.3d 491, 849 N.E.2d 268 (2006). A court can never infer that a statute is to be applied retroactively. *Id.*; *Ackison v. Anchor Packing Co.*, 120 Ohio St.3d 228, 231, 897 N.E.2d 1118 (2008) ("The General Assembly's failure to clearly enunciate retroactivity ends the analysis, and the relevant statute may be applied only prospectively.").

There is no language in the 1989 DMA to suggest it was to be applied retroactively. In arguing that the 1989 DMA is a retroactive statute, Appellants completely ignore the three-year grace period built right into the statute. That fact, alone, renders Appellants' arguments meritless. While the 1989 DMA was self-executing, it did not self-execute on the date of enactment. Instead, it provided all severed mineral holders with a three-year grace period, from March 22, 1989 until March 22, 1992, during which they could avoid abandonment through one of several simple preserving actions. Thus, it relied upon the future inaction of the severed mineral holders, not solely their past conduct, and such a statute is compliant with Ohio law. *See State ex rel. A.A.A. Investments*, 17 Ohio St.3d at 152.

Additionally, the fact that a statute reviews past conduct, like the 1989 DMA or the Marketable Title Act, does not make that statute retroactive. *Heifner v. Bradford*, 5th Dist. Case No. CA-81-10, 1982 WL 2902 (Jan. 29, 1982) *overruled on other grounds by* 4 Ohio St.3d 49 (1983) ("Thus, it is only the prospective action or inaction of the owners of real property interests after the effective date of the act which influences their rights. The singular retrospective aspect of looking back to a "root of title" filed before the act became effective does not violate Article II, Section 28 of the Ohio Constitution (prohibiting retroactive laws)."). The 1989 DMA, when enacted, did review severed mineral holders' past conduct between March 22, 1969 and March 22, 1989. However, it did not subject those severed interests to abandonment based upon that past conduct; instead, it placed those holders on notice that they needed to subject their interests to a preserving event, for example by simply filing a claim to preserve, within three years from the statute's enactment date. Appellants' failure to follow that mandate resulted in the abandonment of their severed interest and as a result, the 1989 DMA complies with Article II, § 28 of the Ohio Constitution. See *Thompson v. Custer*, 2014-Ohio-5711, 26 N.E.3d 278, ¶¶ 20-29 (11th Dist.) (holding there was no language in either the 2006 or 1989 version of DMA to suggested either was to be applied retroactively); *Tribett v. Shepherd*, 2014-Ohio-4320, 20 N.E.3d 365, ¶57 ("The 1989 version, like the 2006 version, has a 20 year look-back period. Thus, if the look-back period for the 2006 version is not retroactive, neither is the look-back period in the 1989 version.").

Appellants' reliance upon *Tobacco Use Prevention & Control Found. Bd. of Trustees v. Boyce*, 127 Ohio St.3d 511, 2010-Ohio-6207, 941 N.E.2d 745, is misplaced, as this Court held the statute was not a retroactive statute, stating the statute applies only from the date of its enactment. *Id*. at ¶ 13. This Court went further, stating "In *E. Liverpool v. Columbiana Cty.*

Budget Comm., 114 Ohio St.3d 133, 2007-Ohio-3759, 870 N.E.2d 705, ¶ 31, we stated that 'when the application of a statute to the case before us involves only a prospective operation, we will not entertain a retroactivity claim under Section 28, Article II. *State v. Hawkins* (1999), 87 Ohio St.3d 311, 314, 720 N.E.2d 521." (Emphasis added). The 1989 DMA applied only prospectively, after a three year grace period. Abandonment of dormant, severed mineral interests began three years after the date of enactment and would then apply thereafter. The act did not impose abandonment based solely on past events and as a result, Appellants' retroactivity challenge should not be entertained. *Id.*

2. **Even if the Court finds the 1989 DMA was retroactive, it is remedial in nature.**

A retroactive statute is substantive, and unconstitutionally retroactive, "if it impairs or takes away vested rights, affects an accrued substantive right, imposes new or additional burdens, duties, obligations, or liabilities as to a past transaction, or creates a new right." *State v. Cook*, 83 Ohio St. 3d 404, 411, 700 N.E.2d 570 (1998). Yet, remedial laws are those affecting only the remedy provided, and include laws that merely substitute a new or more appropriate remedy for the enforcement of an existing right. *Id.*

As part of Ohio's Marketable Title Act, the 1989 DMA operates much like a recording statute in that it requires mineral interest holders to file "successive filings of claims" to preserve mineral interests "indefinitely." R.C. 5301.56(D)(1); *see also Texaco, Inc. v. Short*, 454 U.S. 513, 527, 102 S.Ct. 781 (1982) (finding Indiana's dormant mineral statute operates similar to a recording statute). Recording statutes allow for valid property transfers to be defeated if an earlier transfer is not recorded properly. *Texaco* at 527. These types of recording statutes have been found constitutional, even as applied retroactively to deeds that did not need to be recorded at the time they were dated. *Id.* (holding the practical consequences of extinguishing a right are

identical to the consequences of eliminating a remedy); *see also Pinkney v. Southwick Investments, LLC*, 8th Dist. Nos. 85074 & 85075, 2005 WL 1926507, *7 (Aug. 11, 2005) (finding the legislature can require a recording act and that Ohio 's Marketable Title Act was merely remedial and constitutional retroactive legislation). Accordingly, as recording statutes "generally depend on the sound discretion of the legislature,"' even if this Court finds the 1989 DMA included express language, which maked it retroactive, the 1989 DMA is constitutional because it is a remedial statute. *See Texaco* at 527.

C. **The 1989 DMA provided all severed mineral holders sufficient due process by providing a three-year grace period and by identifying several, simple methods to preserve their interests.**

In order to prove that a statute is unconstitutional, a litigant must meet a high burden of overcoming the strong presumption of constitutionality. *State v. Cowan*, 103 Ohio St.3d 144, 146, 814 N.E.2d 846 (2004) *citing State v. Hochhausler* 76 Ohio St.3d 455, 458, 668 N.E.2d 457 (1996). The party challenging a statute's constitutionality must establish "the unconstitutional nature of the statute beyond a reasonable doubt." *Id*. The 1989 DMA has been ruled constitutional by all three Ohio appellate courts to address this issue. *Tribett v. Shepherd*, 2014-Ohio-4320, 20 N.E.3d 365 ¶¶ 54-57 (7th Dist.); *Wendt v. Dickerson*, 5th Dist. Tuscarawas No. 2014 AP 01 0003, 2014-Ohio-4615, ¶ 42 (Oct. 16, 2014); *Thompson v. Custer*, 2014-Ohio-5711, 26 N.E.3d 278, ¶¶ 26-28 (11th Dist.). Appellants have not raised any arguments which cast doubt upon those decisions and the Court should decline to entertain Appellants' arguments. Appellants have not met their burden of proving that the 1989 DMA is unconstitutional beyond a reasonable doubt.

A review of the relevant law on the subject of due process requires one conclusion: the 1989 DMA complies with due process protections. While it is true that Ohio protects its citizens' property rights, those rights may still be divested so long as due process of law is provided.

Miami Cty. v. City of Dayton, 92 Ohio St. 215, 225, 110 N.E. 726, 729 (1915) ("The 'due process' clause has been much abused and stretched to limits never designed by the Constitution makers. But it must be observed that it is not the deprivation of property that is prohibited by this amendment, but the deprivation of property *without due process of law*.")

1. **The 1989 DMA affects abandoned property interests, and therefore, holders of abandoned mineral interests are not entitled to due process protections.**

The 1989 DMA does not concern a protected interest for which procedural due process protections are necessary. Procedural due process protects interests which are "presently enjoyed." *State v. Newberry*, 77 Ohio App.3d 818, 821, 603 N.E.2d 1086 (4th Dist. 1991). Where an individual suffers no loss or enjoys no property interest subject to governmental deprivation, there is little need for procedural safeguards. *Id.* Accordingly, abandoned property is not entitled to procedural due process protections. *See Texaco* at 548 (stating that once property is determined abandoned, the owner is deprived of nothing); *Van Slooten v. Larsen*, 410 Mich. 21, 54, 299 N.W.2d 704, 715, fn. 32 (1980) (holding under Michigan's DMA that since the property owner has abandoned the mineral interests, the provisions which vest title to the severed interest in the surface owner deprive the mineral interest holder of nothing); *see also Sogg v. Zurz*, 121 Ohio St.3d 449, 2009-Ohio-1526, 905 N.E.2d 187, 8-10, 16 (concluding that unclaimed funds were not abandoned property, but the owner's property, and because they were not abandoned, the state could not appropriate interest on the property). Further, it is not action of the state, but the inaction of the abandoned mineral owner that led to the lapse of the property. *Texaco* at 526. Thus, abandoned property is not a property interest that is entitled to due process protection.

2. **Ohio's Constitution, including its Due Process Clause, was modeled explicitly after the United States Constitution.**

Even if Appellants were entitled to Due Process, the three year grace period provided by the statute forecloses any argument that the statute is invalid. Appellants erroneously claim that the Court must ignore clear precedent from the United States Supreme Court on a statute which is substantially similar to the 1989 DMA. (*See* Petitoners' Merit Brief, p. 9). However, federal precedent applying the United States Constitution and its Due Process Clause is extremely instructive because the Due Process Clause of the Ohio Constitution is modeled after the Due Process Clause of the United States Constitution. *Groch v. Gen. Motors Corp.*, 117 Ohio St.3d 192, 2008-Ohio-546, 883 N.E.2d 377, ¶ 53 (2008) *citing Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 880 N.E.2d 420 (2007); *see Peebles v. Clement*, 63 Ohio St.2d 314, 317, 408 N.E.2d 689 (1980); *see also In re Hua*, 62 Ohio St.2d 227, 230, 405 N.E.2d 255, 258 (1980) ("Because the 'due course of law' provision of the Ohio Constitution is virtually the same as the 'due process' clause of the Fourteenth Amendment to the United States Constitution, we have frequently referred to opinions of the United States Supreme Court decided under the Fourteenth Amendment in defining the parameters of rights guaranteed under Article I of the Ohio Constitution."). As a result, the United States Supreme Court's analysis of Indiana's dormant mineral statute in *Texaco v. Short*, 454 U.S. 516, 102 S.Ct. 781 (1982), should guide this Court's analysis of the 1989 DMA's constitutionality.

The 1989 DMA was enacted to promote Ohio's legitimate interest in the efficient and reasonable production of its natural resources. *See* Article II, § 36 of the Ohio Constitution. In promoting that legitimate and substantial state interest, it required dormant mineral holders to take simple steps to preserve their interests. **It gave those mineral holders a three-year grace**

period in which to act. The United States Supreme Court addressed Appellants' argument by saying with respect to Indiana's DMA which included a two year grace period:

> The 2-year grace period provided by the statute forecloses any argument that the statute is invalid because mineral owners may not have had an opportunity to become familiar with its terms. Property owners are charged with knowledge of relevant statutory provisions affecting the control or disposition of their property. Moreover, the greatest deference must be accorded to the judgment of state legislatures as to whether a statutory grace period provides an adequate opportunity for citizens to become familiar with a new law.

Texaco, 454 U.S. 516, paragraph four of the syllabus (internal citations omitted). The United States Supreme Court further stated:

> **Given Appellants' presumed knowledge that their unused mineral interests would lapse unless they filed a statement of claim, Appellants had no constitutional right to be advised that the 20-year period of nonuse was about to expire.** Since the State may impose on a mineral interest owner the burden of using that interest or filing a statement of claim, it follows that the State may impose on him the lesser burden of keeping informed of the use or nonuse of his own property.

Id. (Emphasis added). The 1989 DMA provided all severed mineral holders with a three-year advanced notice of impending abandonment. Those mineral holders had ample notice that they needed to preserve their interests between March 22, 1989 and March 22, 1992. As a result, Appellants were given notice commensurate with Due Process. All Appellants had to do was file a simple claim to preserve during that three-year period or obtain a tax parcel number for the severed mineral interest or transfer it through a recorded instrument. They chose not to do so and therefore, abandoned their interest.

In discussing the constitutionality of a self-executing mineral lapse statute the United States Supreme Court stated:

> In answering this question, it is essential to recognize the difference between the self-executing feature of the statute and a

> subsequent judicial determination that a particular lapse did in fact occur. As noted by Appellants, no specific notice need be given of an impending lapse. If there has been a statutory use of the interest during the preceding 20-year period, however, by definition there is no lapse-whether or not the surface owner, or any other party, is aware of that use. Thus, no mineral estate that has been protected by any of the means set forth in the statute may be lost through lack of notice. It is undisputed that, before judgment could be entered in a quiet title action that would determine conclusively that a mineral interest has reverted to the surface owner, the full procedural protections of the Due Process Clause-including notice reasonably calculated to reach all interested parties and a prior opportunity to be heard-must be provided.

Texaco, 454 U.S. at 533-34. The quote makes clear that a quiet title suit is not a necessary component, for purposes of due process, of a self-executing dormant mineral statute. Instead, the United States Supreme Court made clear that before a party could have a court conclusively confirm that no preserving events had occurred during the relevant abandonment period, the mineral interest holder would need to be given proper notice of that litigation. This conclusion is further bolstered by the Court's statement, just four paragraphs after the above quote, that:

> As emphasized above, Appellants do not challenge the sufficiency of the notice that must be given prior to an adjudication purporting to determine that a mineral interest has not been used for 20 years. Appellants simply claim that the absence of specific notice prior to the lapse of a mineral right renders ineffective the self-executing feature of the Indiana statute. That claim has no greater force than a claim that a self-executing statute of limitations is unconstitutional. The Due Process Clause does not require a defendant to notify a potential plaintiff that a statute of limitations is about to run, although it certainly would preclude him from obtaining a declaratory judgment that his adversary's claim is barred without giving notice of that proceeding.

Id. at 536. Appellants were given ample notice that they needed to use their dormant interest within the three years after the 1989 DMA was enacted. They chose not to act. Appellants had notice of this lawsuit and the ability to raise any arguments regarding any purported saving

events, which they have done in this litigation. As a result, the Court should reject Appellants' attempt to invalidate a law which is undoubtedly constitutional.

3. The 1989 DMA operates in the same manner as the Ohio Marketable Title Act which complies with the Due Process Clause of the Ohio Constitution.

Ohio's Marketable Title Act operates in the same manner as the 1989 DMA, and comports with Due Process. Under the Marketable Title Act, a real property interest which is not preserved by an enumerated preservation event during a specified time period is deemed ineffective. R.C. 5301.47, *et seq*. The Marketable Title Act also does not require the party seeking extinguishment to take any action. *Evans v. Cormican*, 5th Dist. Licking No. 09 CA 76, 2010-Ohio-541, (Jan. 5, 2010) (finding that the Marketable Title Act operates, **automatically**, to remove clouds from title that pre-date the root of title); *see Heifner v. Bradford*, 4 Ohio St.3d 49, 446 N.E.2d 440 (1983) ; *see Collins v. Moran*, 7th Dist. Mahoning No. 02 CA 218, 2004-Ohio-1381 (March 17, 2004) . Importantly, the Marketable Title Act does not require advance notice to the interest holder before extinguishment occurs. *See id*.

Just like the 1989 DMA, the Marketable Title Act provides the interest owner with the ability and opportunity to preserve his or her interest by simply filing a notice to preserve. *See* R.C. 5301.51. However, if no such preservation notice was filed during the applicable period and the interest was extinguished automatically by the Marketable Title Act, then the Marketable Title Act provides that an extinguished interest <u>cannot</u> be revived by the filing of a notice to preserve after the fact. R.C. 5301.49(D). Thus, the Marketable Title Act explicitly provides that once an interest is extinguished by failure of the owner to timely preserve his or her interest, the former owner forever and irrevocably loses his or her interest. An untimely filed preservation notice is of no effect.

The 1989 DMA fundamentally operates in the same manner by requiring the severed mineral holders to take simple steps to preserve their mineral interests, except it looks at a twenty-year period, rather than 40 years from the "root of title". Similarly to the Marketable Title Act generally, R.C. 5301.56(B)(1) provides that any severed mineral interest which is not subjected to one of the enumerated "savings events" "shall be **deemed abandoned** and **vested** in the owner of the surface." (Emphasis added).

The Marketable Title Act, which operates in a manner substantially similar to the 1989 DMA, complies with the Due Process Clause of Ohio Constitution. *Heifner*, 1982 WL 2902; *Pinkney v. Southwick Investments, L.L.C.*, 8th Dist. Cuyahoga Nos. 85074, 85075, 2005-Ohio-4167 (Aug. 11, 2005). In *Heifner*, the Fifth District reviewed changes to the Marketable Title Act, specifically, the inclusion of mineral rights as interests subject to extinguishment. *Id*. at 8. When deciding that those changes satisfied due process, the court stated: "The grace period after the Ohio act became applicable to mineral interests was three years and two weeks, which gave the plaintiffs-appellees ample time to file a notice." *Id*. With the 1989 DMA, mineral holders, Appellants included, were given a three-year grace period during which they could have subjected their interests to an initial preserving event, including the filing of a claim to preserve. As a result, the 1989 DMA, just like the changes to the Marketable Title Act, complies with the Due Process Clause of the Ohio Constitution. *See id*. Based on the foregoing, the Court must find that the 1989 DMA complies with the Due Process Clause of the Ohio Constitution.

D. **<u>The 1989 DMA is not void-for-vagueness because it provides a simple, preserving mechanism whereby an average person would understand that severed mineral holders must use their interests.</u>**

1. **The correct standard of review is the "substantially incomprehensible" standard and not a heightened standard.**

The Court should apply the "less strict vagueness test" as opposed to a heightened test under the authority of *Columbia Gas Transm. Corp. v. Levin*, 117 Ohio St.3d 122, 2008-Ohio-511, 882 N.E.2d 400, ¶ 46. ("A civil statute that does not implicate the First Amendment is unconstitutionally vague only if it is so vague and indefinite that it sets forth no standard or rule or if it is substantially incomprehensible.")

"The void-for-vagueness doctrine is a component of the right to due process and is rooted in concerns that laws provide fair notice and prevent arbitrary enforcement." *In re Application of Columbus S. Power Co.*, 134 Ohio St.3d 392, 2012-Ohio-5690, 983 N.E.2d 276, ¶ 20 *citing Skilling v. United States*, 561U.S. 358, 130 S.Ct. 2896, 2933, 177 L.Ed.2d 619 (2010). To prevail on such a challenge, a litigant "must show that the statute is vague 'not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.'" *State v. Anderson*, 57 Ohio St.3d 168, 171, 566 N.E.2d 1224, 1226 (1991) *quoting Coates v. Cincinnati*, 402 U.S. 611, 614, 91 S.Ct. 1686, 1688, 29 L.Ed.2d 214 (1971); *Columbia Gas Transm.*, 117 Ohio St.3d 122, ¶ 42. "In other words, the challenger must show that upon examining the statute, an individual of ordinary intelligence would not understand what he is required to do under the law." *Id.*; *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 102 S.Ct. 1186, 1188-89, 71 L.Ed.2d 362 (1982) (holding that a court should sustain a void-for-vagueness "challenge only if the enactment is impermissibly vague in all of its applications.")

The 1989 DMA does not effectuate a taking of private property. Instead, it operates very much like Ohio's adverse possession law. *See State ex rel. A.A.A. Investments*, 17 Ohio St.3d at 152. A property owner is placed on notice that his or her inaction will result in abandonment of a real property right in favor of the party who is best positioned the use the interest–the surface owner in the case of the 1989 DMA and the adverse user in the case of adverse possession. As a result, the Court should not apply a heightened standard of review.

Appellants' sole authority to support use of a heightened standard of review, *Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, is distinguishable from this case and appears to have been further limited by the Court. First and foremost, that case involved the interpretation of Ohio's eminent domain law, which has been and continues to be strictly reviewed and scrutinized. *Id*. at ¶¶ 39-72. In rendering the *Norwood* opinion, this Court provided the limited holding that a court should apply a heightened standard when reviewing Ohio's eminent domain statute. *Id*. at ¶ 88. The Court did not go further to state that any statute which implicates real property rights requires heightened scrutiny. *See Columbus S. Power Co.*, 134 Ohio St.3d 392, ¶ 16.

No such concerns exist here. The 1989 DMA is a statute of abandonment, is not an eminent domain statute or regulation, and operates in a manner substantially similar to the Marketable Title Act and Ohio's adverse possession law. It does not effectuate a taking, whereby the State takes private property rights of one party and gives those rights to another. Instead, the statute provides the guidelines to be used in determining whether one private party abandoned his or her real property in favor of another private party.

The 1989 DMA is a civil statute, as opposed to a criminal statute, does not implicate the First Amendment, is not an eminent domain statute, and does not substantially implicate

constitutional protections. As a result, the Court should review the 1989 DMA like any other civil statute and apply the substantially incomprehensible test. *See Columbia Gas*, 117 Ohio St.3d 122, ¶ 46.

2. **The 1989 DMA gave simple, reasonable steps for the preservation of severed mineral rights and in doing so, unequivocally placed the burden of action upon the severed mineral holders.**

The 1989 DMA provided all interested parties with reasonable warning as to their obligations. The statute provided, in relatively simple terms, what actions a severed mineral owner could take to preserve his or her interest. R.C. 5301.56(B). It provided that beginning on March 22, 1992, dormant, severed mineral interests which had not been subject to an enumerated preserving event within the preceding twenty years would be deemed abandoned and vested with the surface estate. R.C. 5031.56(B). It is important to keep in mind that the 1989 DMA need not have been drafted with great precision. *Columbia Gas*, 117 Ohio St.3d 122, ¶ 46. A person of average, reasonable intelligence could understand what steps he or she could take to preserve the interest. The statute is most certainly not "substantially incomprehensible," which is the appropriate standard of review. *Columbia Gas*, 117 Ohio St.3d 122, ¶ 46; *Buckley v. Wilkins*, 105 Ohio St.3d 350, 2005-Ohio-2166, 826 N.E.2d 811, ¶ 19 (2005).

Appellants take issue only with whether the statute uses continuous 20-year review periods and whether the law is self-executing. (Appellants' Merit Brief, p. 20). Appellants support their argument solely through reference to varying legal interpretations and arguments. (Appellants' Merit Brief, p. 20). However, varying interpretations of a statute are not appropriate evidence on the issue of whether a reasonable person of average intelligence is able to understand his or her rights or obligations under a statute. *Id. quoting Hutchins v. Dist. of Columbia*, 188 F.3d 531, 546 (C.A.D.C.1999) ("The fact that "'the fertile 'legal imagination can conjure up hypothetical cases in which the meaning"' of disputed terms could be questioned does

not render the provision unconstitutionally vague.") Appellants were required to prove that the 1989 DMA was '"so vague and indefinite as really to be no rule [or standard] at all…" *Id. quoting Chavez v. Hous. Auth. of El Paso*, 973 F.2d 1245, 1249 (C.A.5, 1992). Appellants have failed to meet that burden. The 1989 DMA provided an abandonment device, a review period, and a list of actions that a severed mineral holder could take to avoid abandonment. As a result, the statute is not void-for-vagueness.

Amici Curiae submit that even if the 1989 DMA was subject to the heightened standard used in the *Norwood* case, it would survive review. Under either test, "a statute is not void simply because it could be worded more precisely or with additional clarity." *Norwood*, 110 Ohio St.3d 353, ¶ 86. Instead, the "critical question in all cases is whether the law affords a reasonable individual of ordinary intelligence fair notice and sufficient definition and guidance to enable him to conform his conduct to the law…" *Id*. Applying these standards, the *Norwood* Court overturned a municipal eminent domain ordinance which allowed the appropriate of property solely "upon a finding that the property is in an area that it deteriorating." *Id*. at ¶ 90. The Court took great issue with how Norwood defined "deteriorating area," finding that the definition would apply to "virtually every urban American neighborhood." *Id*. at ¶ 93. The Court also found that the statutory definition of that term "inherently incorporates speculation as to the future condition of the property into the decision on whether a taking is proper rather than focusing that inquiry on the property's condition at the time of the proposed taking." *Id*. at ¶ 104.

None of the *Norwood* Court's concerns are implicated with the 1989 DMA. The statute fairly defined the interests subject to abandonment: non-coal mineral interests severed from the surface estate. R.C. 5301.56(B)(1). It provided a list of actions that could be undertaken to avoid abandonment of those types of interests, including simply filing a claim to preserve. R.C.

5301.56(B)(c). Finally, it provided a three-year grace period to all Ohioans, during which they could learn what was required of them. The 1989 DMA was not so vague as to provide no standard of conduct and was not inherently subject to varying subjective interpretations. As a result, the 1989 DMA survives a challenge utilizing the standard of review of *Norwood*.

II. **PROPOSITION OF LAW NO. VII: A claim brought under the 1989 version of the DMA must have been filed within 21 years of March 22, 1989 (or, at the very latest, March 22, 1992), or such claim is barred by the statute of limitations in R.C. 2305.04.**

A. **The 1989 DMA placed the burden of action upon the severed mineral holders and as a result, they, and not the surface owners, were required to act.**

Appellants' Proposition of Law No. VII is propped up on the flaw argument that a surface owner was required to bring an action under the 1989 DMA to effectuate abandonment and vesting. Under the 1989 DMA, a surface owner was not required to bring any action to effectuate the abandonment and vesting. As a result, on March 22, 1992, when a severed mineral interest had remained dormant for twenty-plus years, it was abandoned and vested with the real estate's surface estate. Appellants' argument that a surface owner must file a quiet title action within 21 years of abandonment renders the self-executing mechanism of the 1989 DMA meaningless and constitutes an impermissible end-run around the 1989 DMA.

Section 5303.01 of the Revised Code, which governs quiet title actions, provides, in part:

> An action may be brought by a person in possession of real property, by himself or tenant, against any person who claims an interest therein adverse to him, for the purpose of determining such adverse interest. Such action may be brought also by a person out of possession, having, or claiming to have, an interest in remainder or reversion in real property, against any person who claims to have an interest therein, adverse to him, for the purpose of determining the interests of the parties therein.

As is clear from the text of the statute, only a party who has an interest in a piece of real property, either a current vested, possessory interest or a future interest, may bring a claim for

quiet title. Not only does a claim for quiet title require the asserting party to be in possession of the real property, it also requires the assertion of an adverse interest against that party.

The 1989 DMA placed the burden of action on the severed mineral holder. If the holder of the severed mineral rights failed to undertake one of the 1989 DMA's enumerated savings events, those severed rights were abandoned and vested with the requisite surface estate. R.C. 5301.56 (B)(1)(c)(i)-(vi). Nowhere within the text of the 1989 DMA is an obligation imposed upon the surface owner. Any interpretation of the 1989 DMA which would impose an obligation on the surface owner ignores the plain text of the 1989 DMA and cannot be sustained. *Walker v. Shondrick-Nau*, 7th Dist. Noble No. 13 NO 402, 2014-Ohio-1499; *Wendt*, 2014-Ohio-4615; *Thompson v. Custer*, 2014-Ohio-5711.

Based upon the plain language of the 1989 DMA and the Fifth, Seventh, and Eleventh Districts' jurisprudence, the holders of severed mineral interests (Appellants) were under an obligation to bring a quiet title lawsuit against surface owners within 21 years of March 22, 1992. From that date forward, those surface owners had a vested interest in their real property's oil and gas rights, free and clear of the severed mineral interests.

Appellants' arguments also erroneously undercut R.C. 5301.55, which mandates that the 1989 DMA is to "be liberally construed to effect [sic] the legislative purpose of simplifying and facilitating land title transactions by allowing persons to rely on a record chain of title." By re-unifying old unused interests, which over time can become splintered and fractionalize, in a readily identifiable surface owner, the 1989 DMA provided title certainty that if certain statutorily specified events did not occur within a certain time frame, then the interest was abandoned and vested in the surface owner. It promoted these policy goals by placing minimal obligations upon those individuals who owned severed mineral rights. Appellants' arguments do

not simplify and facilitate land transactions. Rather, they needlessly complicate title by requiring litigation within 21 years from the date of abandonment and vesting. As a result, the Court should dismiss Appellants' R.C. 2305.04 arguments.

B. **Appellants' arguments would render the Marketable Title Act useless.**

Appellants' theory is that any property owner who seeks to utilize a statutory mechanism for the extinguishment or abandonment of an adverse property interest must bring suit within 21 years from the extinguishment or abandonment. If correct, such a theory would render the Marketable Title Act useless.

Under the Marketable Title Act, a real property interest which is not preserved by an enumerated preservation event during a specified time period is deemed extinguished and ineffective. R.C. 5301.47, *et seq*. The Marketable Title Act, like the 1989 DMA, does not require the party seeking extinguishment to take any action. *Evans v. Cormican*, 5th Dist. Licking No. 09 CA 76, 2010-Ohio-541, (Jan. 5, 2010) (finding that the Marketable Title Act operates, automatically, to remove clouds from title that pre-date the root of title); *see Heifner v. Bradford*, 4 Ohio St.3d 49, 446 N.E.2d 440 (1983); *see Collins v. Moran*, 7th Dist. Mahoning No. 02 CA 218, 2004-Ohio-1381 (March 17, 2004). The Marketable Title Act does not require advance notice to the interest holder before extinguishment occurs. *See id*.

Just like the 1989 DMA, the Marketable Title Act provides the interest owner with the ability and opportunity to preserve his or her interest by simply filing a notice to preserve. *See* R.C. 5301.51. However, if no such preservation notice was filed during the applicable period and the interest was extinguished automatically by the Marketable Title Act, then the Marketable Title Act provides that an extinguished interest cannot be revived by the filing of a notice to preserve after the fact. R.C. 5301.49(D). Thus, the Marketable Title Act explicitly provides that

once an interest is extinguished by failure of the owner to timely preserve the interest, the former owner forever and irrevocably loses his or her interest.

Keeping in mind that a property owner is under no obligation to bring a quiet title suit to effectuate extinguishment under the Marketable Title Act, Appellants' position would mean that any such owner must bring a claim within 21 years from the date of extinguishment or risk forever being barred from defending title against the extinguished interest. Such a result is not supported by Ohio law and does not further the purpose of "simplifying and facilitating land title transactions." R.C. 5301.55.

The fallacy of Appellants' argument can be demonstrated by way of a simple example. Suppose an encumbrance on real property was created in 1900. In 1980, a party purchases the real property affected by the encumbrance. Let's also assume that when the purchase took place the encumbrance met all of the Marketable Title Act's extinguishment factors. Thus, in 1980, the purchaser obtained marketable title to the real property free of the encumbrance. Finally, let's assume the purchaser did not bring a quiet title lawsuit within 21 years from 1980, which would be a common situation. Then, in 2014, some 34 years after purchase of the real property, a party comes forward and seeks to enforce the encumbrance. Pursuant to Appellants' position the owner cannot sue that party seeking to quiet title under the prior automatic operation of the Marketable Title Act. Surely, the owner would be entitled to assert that he has superior title in a quiet title action; otherwise, the Marketable Title Act would serve no purpose. The 1989 DMA operates in the same manner. Beginning in 1992, dormant, severed mineral interests were abandoned and vested with the real estate's surface estate, as a matter of law. Surface owners were vested with title to those dormant interests and were not required to bring litigation to

confirm that vesting. As a result, Appellants' arguments based upon the statute of limitations for quiet title actions must be disregarded.

C. **A surface owner's claim for quiet title would not accrue upon the severed interest's abandonment, but upon the severed mineral holder's assertion of continued validity after the abandonment.**

Assuming, *arguendo*, that surface owners were required to bring a quiet title claim to end severed mineral holders' ownership claims, Appellants misconstrue the date on which those quiet title claims accrue. Appellants argue that the surface owners' claims accrued on March 22, 1989. However, such an argument violates Ohio law on this issue.

First, no interests were abandoned under the 1989 DMA until March 22, 1992. This was accomplished through a three-year grace period. As a result, Appellants' argument must be rejected based solely on the grace period. For instance, in this case the lawsuit was filed April 16, 2012, within 21 years of March 22, 1992.

Additionally, Appellants ignore the purpose and elements of a quiet title claim. A claim for quiet title accrues on the date on which an adverse interest is asserted against a party's title. *Halliday v. Norfolk & W. Ry. Co.*, 44 Ohio Law Abs. 208, 215, 62 N.E.2d 716 (2nd Dist. 1945) ("It is also asserted by the appellant that the City of Columbus is fifty years too late in seeking to quiet title. **The City had no cause of action to quiet title until somebody asserted title against it**, and it was not until this suit was brought that Bruck or anyone else asserted title, and therefore neither laches nor limitation began to run until the institution of the suit.") (Emphasis added); *Matheson v. Morog*, 6th Dist. Erie No. E-00-017, 2001 WL 85149, * 6 (Feb. 2, 2001); *McCarley v. O.O. McIntyre Park Dist.*, 4th Dist. Gallia No. 99 CA 07, 2000 WL 203997. Once that adverse interest is asserted, a party has 21 years with which to bring a claim for quiet title against that interest. *Id*. Such a result is reasonable when one considers the plain language of R.C. 5303.01, which provides, in part:

> **An action may be brought** by a person in possession of real property, by himself or tenant, **against any person <u>who claims an interest therein adverse to him</u>**, for the purpose of determining such adverse interest. Such action may be brought also by a person out of possession, having, or claiming to have, an interest in remainder or reversion in real property, against any person who claims to have an interest therein, adverse to him, for the purpose of determining the interests of the parties therein.

(Emphasis added). The critical point in time is when a person asserts an adverse interest against the property owner, not the date on which the owner alleges that the adverse interest was abandoned or extinguished.

The crucial fact in this matter is the point at which a holder of a dormant severed mineral interest asserted that the interest was valid after the abandonment on March 22, 1992. On that date, interests were abandoned, as a matter of law, and were no longer valid. To be adverse to the surface owners' title, a claim or assertion of superior title must have been made after 1992. Here, Appellants appear to have asserted validity of their severed interest in 2011, when they filed a claim to preserve during abandonment proceedings under the current version of R.C. 5301.56. *Tribett*, 2014-Ohio-4320, ¶ 6. Appellees filed the litigation in 2012. *Id*. As a result, even if Appellees were required to file a quiet title lawsuit and even if they were on the 21-year clock, they filed it well-within 21 years after Appellants asserted their severed mineral interest was still valid after abandonment.

D. **<u>A surface owner's claim for quiet title would not accrue until he or she actually owned the surface estate at issue.</u>**

Not only does a quiet title action not accrue until an adverse interest is asserted, but, said claim does not accrue against a particular person until he or she obtains title to and/or the right to possess the real property at issue. When deciding whether an adverse interest against a life tenant is adverse to remaindermen for purposes of quiet title statute of limitations analysis, this Court has resoundingly said no. *Webster v. Pittsburg, C. & T.R. Co.*, 78 Ohio St. 87, 96-100, 84 N.E.

592 (1908) ("It is not good argument here to say that because the heirs were silent and did not endeavor to prevent the company from taking possession and building the road, that they have lost their estate or right to reclaim it. Authorities hereafter cited or quoted refute the proposition. *** It is said by Warvelle in his work on Ejectment, § 452: 'As a general rule of uniform observance, **no possession of lands can be deemed adverse to a party who has not, at the time, a right of entry and possession**. For this reason a disseisin of a life tenant, or the owner of any particular estate, has no effect upon rights held in remainder or reversion. Such disseisin imposes no obligation upon the remainderman or reversioner to enter, nor will the statute commence to run against them until the termination of the particular estate, no matter how long the tenant thereof may have been disseised.'") (Emphasis added.) Going further, the Court stated:

> The railroad company was not disposed to move in proceedings to gain title and possession, and can it be heard to say that because the heirs kept silent until after the death of the life tenant, it will add the years of the life tenancy after the wrongful entry to the years since its termination in order to defeat the present remedy? **Again, we say the possession of the company during the life tenancy was adverse to the tenant rather than to the remaindermen**, and the lime [sic] should not be so computed, and it is of the very life of the statutory bar that the possession by the railroad company was, for 21 years next before suit, continuously and openly adverse to the heirs. **Such possession may have been open, notorious, and continuous for the statutory period, yet, if it was not also adverse, it availeth nothing. This is the counterpart of the first proposition discussed, namely, that the heirs, not having a right of entry during the existence of the life estate, could not have brought ejectment against the company during that period.**

Id. at 98 (emphasis added); *see also Bergholtz Coal Holding Co. v. Dunning*, 11th Dist. Lake No. 2004-L-209, 2006-Ohio-3401, ¶ 42 (June 30, 2006) (finding that plaintiff's claim accrued on the date on which the real property was quitclaimed to plaintiff). This rule makes perfect sense when considering that a quiet title claim requires the assertion of an interest **which is adverse** to the

complainant's interest in the real property. A party cannot possibly have a quiet title claim until he or she actually has an interest in the affected real property.

In the instant matter, Appellees did not first acquire title to the real estate until 1996. *Tribett*, 2014-Ohio-4320, ¶ 5. At no time prior to 1996 was any interest claimed by Appellants adverse to Appellees' interest in the real estate. Appellees did not own the real estate in 1992 and thus, even if Appellants' interest was adverse to the real estate in 1992, a fact which Amicus Curiae expressly deny, the interest was not adverse to Appellees. As a result, Appellees' claim for quiet title could not have accrued prior to 1996, the year in which they first acquired an interest in the real estate. This lawsuit was brought well within 21 years after 1996, and, as a result, Appellees' claims are timely.

CONCLUSION

In attempting to achieve their goals of efficient production of Ohio's natural resources, the General Assembly enacted the 1989 DMA as a statute of abandonment. The 1989 DMA gave all severed mineral holders sufficient notice, in the form of a three-year grace period, with which to acquaint themselves with the law and take one of several simple steps to preserve their interests. As a result, it operated only prospectively and provided sufficient due process. In addition, the statute was simple and clear: severed mineral holders were required to use their interests or lose them. As a result, the statute was not void-for-vagueness. Finally, the 1989 DMA required action by the severed mineral holders and not the surface owners and a result, R.C. 2305.04 does not apply to surface owners' quiet title claims. In addition, the time for accrual of the surface owners' claims is the date on which severed mineral holders first assert that their interests are valid after the previous abandonment. As result, Appellees' claims are timely, even if R.C. 2305.04 applies.

/s/ Gregory W. Watts

Gregory W. Watts (0082127)*
**Counsel of Record*
Matthew W. Onest (0087907),
David E. Butz (0039363), and
William G. Williams (0013107) of
KRUGLIAK, WILKINS, GRIFFITHS
& DOUGHERTY CO., L.P.A.
4775 Munson Street NW/P.O. Box 36963
Canton, Ohio 44735-6963
Phone: (330) 497-0700/Fax: (330) 497-4020
gwatts@kwgd.com; monest@kwgd.com;
dbutz@kwgd.com; bwilliams@kwgd.com
Counsel for Amici Curiae Jeffco Resources, Inc., Richmond Mill, Inc., Douglas Henderson, Djuro and Vesna Kovacic, Brett and Kim Trissel, Carol Miller, Barbara L. Miller, Jeffrey V. Miller, Jerilyn E. Christensen and Kjeld F. Christensen, Co-Trustees of the Kjeld F. Christensen Revocable Trust dated September 25, 2012, and the Jerilyn E. Christensen Revocable Trust dated September 25, 2012, Ralph and Sharley Greer, Jeffrey Hickman, and Christopher and Veronica Wendt

PROOF OF SERVICE

I hereby certify that a copy of the foregoing was sent via regular U.S. Mail this 18th day of May, 2016, to:

Richard A. Myser (0007462)*
**Counsel of Record*
Adam L. Myser (0090942)
320 Howard Street
Bridgeport, Ohio 43912
myser@belmontlaw.net
adam.myser@belmontlaw.net
Counsel for Appellees

Matthew Warnock (0082368)*
*Counsel of Record
Daniel Gerken (0088259)
Bricker & Eckler LLP
100 South Third Street
Columbus, OH 43215
mwarnock@bricker.com;
dgerken@bricker.com
Counsel for Appellants

/s/ Gregory W. Watts
Gregory W. Watts (0082127)*
**Counsel of Record*
Matthew W. Onest (0087907),
David E. Butz (0039363), and
William G. Williams (0013107) of
KRUGLIAK, WILKINS, GRIFFITHS
& DOUGHERTY CO., L.P.A.
Counsel for Amici Curiae Jeffco Resources, Inc., Richmond Mill, Inc., Douglas Henderson, Djuro and Vesna Kovacic, Brett and Kim Trissel, Carol Miller, Barbara L. Miller, Jeffrey V. Miller, Jerilyn E. Christensen and Kjeld F. Christensen, Co-Trustees of the Kjeld F. Christensen Revocable Trust dated September 25, 2012, and the Jerilyn E. Christensen Revocable Trust dated September 25, 2012, Ralph and Sharley Greer, Jeffrey Hickman, and Christopher and Veronica Wendt